



February 9, 2023

To: Equal Employment Opportunity Commission
131 M Street NE
Washington, DC, 20507

Re: Equal Employment Opportunity Commission Docket No. EEOC-2022-0006

The Center for Democracy & Technology (CDT) respectfully submits these comments on the Equal Employment Opportunity Commission’s (Commission or EEOC) draft Strategic Enforcement Plan (SEP) covering Fiscal Years 2023-2027. CDT is a nonprofit, nonpartisan 501(c)(3) organization that advocates for stronger civil rights protections in the digital age. CDT’s projects include advocating standards and safeguards to ensure that new technologies, including automated employment decision tools (AEDTs) and other modern employment assessments, do not interfere with workers’ access to employment.

We thank the Commission for the considerable attention it has given to the increasing role of technology in the employment decisions that structure the modern labor market. This has been visible throughout the past two years, from the Commission’s Initiative on Artificial Intelligence and Algorithmic Fairness and joint initiative with the Department of Labor to reimagine equity in hiring, to the Commission’s efforts now to incorporate feedback regarding technology-driven discrimination from its listening sessions into the SEP. We are heartened to see the degree to which the draft SEP demonstrates the Commission’s intention to prioritize the rising threat of technology-driven discrimination in the coming years and begins to lay out the ways in which the EEOC will meet that threat.

Our comments will both (1) highlight the issues on which we are glad to see the Commission focus and (2) identify additional topics that we believe should be discussed more deeply in the final SEP.

The SEP recognizes that technology has an undeniable role in influencing job access.

We are encouraged by the SEP’s inclusion of the following issues. We provide the following commentary in support of – and, in some cases, suggest minor modifications to broaden – the SEP’s attention to:

- The prevalence of targeted advertising and recruiting that intentionally excludes or disproportionately impacts protected groups,
- The impacts of technology-driven hiring on disabled workers, and
- The Commission’s use of systemic investigations and other available tools.

The SEP draws attention to the rising threat of algorithmic discrimination

In the SEP, the Commission correctly draws attention to, and should continue to take action against, the rapidly rising discrimination threat of “software that incorporates algorithmic decision-making or machine learning, including artificial intelligence,” “employers’ increasing use of automated systems,” and other forms of “technology-related employment discrimination” in advertisement, recruitment, screening, pre-employment tests, and background checks. We support the Commission’s expressed intent to deploy the EEOC’s enforcement and outreach tools to mitigate such discrimination.

Technology affects every stage of the jobs lifecycle,¹ and the SEP specifically mentions targeted job advertisements and recruitment practices, correctly recognizing that the potential for discrimination from these tools begins even before workers apply for the job. These pre-application tools can contribute to other barriers that the SEP identifies in recruitment and hiring, such as “job advertisements that exclude or discourage certain demographic groups from applying” and have the effect of “channeling, steering, or segregation of individuals into specific jobs or job duties due to their membership in a protected group.”

The SEP’s inclusion of targeted advertising is notable because advertising platforms direct job advertisements to specific audiences based on inferences derived from their personal information and activity on the platforms themselves, from data gathered from other websites, and from data brokers acting as “advertising partners.” As a result, factors such as protected characteristics and their proxies are used to determine who is and is not targeted for available

¹ Aaron Rieke & Miranda Bogen, Upturn, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias* (2018), <https://www.upturn.org/work/help-wanted/>.

opportunities. Indeed, a recent complaint to the Commission filed by Real Women in Trucking (represented by Upturn and Gupta Wessler PLLC) describes how, despite longstanding calls and efforts to address algorithmic bias in the delivery of targeted advertisements, gender- and age-based discrimination remain a common occurrence in advertising on social media platforms.² Thus, the Commission’s attention to this substantial aspect of the jobs cycle is critical as companies explore new methods to address bias in targeted advertising, since the Commission will need to monitor how effectively these efforts lead to more equitable distribution of job advertisements.³

Acknowledgment of hiring processes’ impacts on disabled workers

We appreciate the Commission’s focus on the impact of hiring processes on disabled workers, in addition to other protected groups. In a 2020 report, we explained that AEDTs may violate two provisions of the Americans with Disabilities Act (ADA) in particular.⁴ First, the ADA requires employers to “administer tests concerning employment in the most effective manner to ensure that...such test results accurately reflect the skills, aptitude,” or other factors such tests purport to measure when administered to a worker with a disability.⁵ Second, the ADA prohibits employers from using qualification standards or selection criteria that screen out or tend to screen out disabled people unless such standards or criteria are job-related for the position in question and consistent with business necessity.⁶ These risks of discrimination are at the center of the Commission’s May 2022 guidance on algorithm-driven discrimination against workers with disabilities.⁷

² Complaint, Real Women in Trucking v. Meta Platforms, Inc. (2022),

<http://guptawessler.com/wp-content/uploads/2022/12/Real-Women-in-Trucking-Meta-Charge.pdf>.

³ For example, Meta has been making changes to its ad delivery practices pursuant to enforcement actions by the Department of Justice, the Department of Housing and Urban Development, and the Commission since 2018. See *id.* at 2-3. Most recently, Meta launched a variance distribution system for improving fairness in housing ad delivery, and plans to extend this system to employment advertisements. See Roy L. Austin, *An Update on Our Ads Fairness Efforts*, Meta (Jan. 9, 2023), <https://about.fb.com/news/2023/01/an-update-on-our-ads-fairness-efforts/>.

⁴ Center for Democracy & Technology, *Algorithm-Driven Hiring Tools: Innovative Recruitment or Expedited Disability Discrimination?* (2020), <https://cdt.org/insights/report-algorithm-driven-hiring-tools-innovative-recruitment-or-expedited-disability-discrimination/>.

⁵ 42 U.S.C. § 12112(b)(7); 29 C.F.R. § 1630.11.

⁶ 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a).

⁷ Equal Employment Opportunity Commission, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence> [hereinafter “EEOC Guidance on ADA and Technology-Based Assessments”].

The Commission should continue to focus on these concerns, particularly in systems that are difficult for disabled workers to use *and* systems that impose discriminatory criteria. We appreciate that the SEP observes that the systems involved in application and evaluation processes today can especially restrict marginalized workers' ability to successfully submit applications or their likelihood of being evaluated fairly. In addition, the Commission explicitly mentions that this includes systems that are difficult for workers with disabilities to access. Separately, the SEP also highlights that application and evaluation processes can include “[q]ualification standards and inflexible policies or practices that discriminate against individuals with disabilities.”

Making full use of the Commission’s enforcement authority

Technology-related employment discrimination should be subject to and a priority within the Commission’s systemic investigations. Systemic investigations “typically have strategic impact because they involve ‘pattern or practices, policy and/or class cases where the discrimination has a broad impact on an industry’.” As the Commission also advised in its 2021 resource on systemic enforcement, systemic cases also include cases of “bias that is built into systems” and “structures that shape the work environment or employment prospects differently for different types of workers.”⁸ Algorithmic systems that embed an employer’s biases in hiring and promotion may be used on entire job markets for particular occupations, and entire workforces within companies. Such systems will undermine access to job or advancement opportunities for certain classes of workers. The Commission should also consider this when prioritizing “meritorious” cases that warrant Commissioners’ charges.⁹

The Commission should also address the knowledge gap between applicants, workers, and employers. The SEP acknowledges the need for the EEOC to focus on “[i]ssues affecting workers who may be unaware of their legal rights or reluctant or unable to exercise their rights.” This is particularly true in the context of AEDTs and other modern selection tools, because candidates frequently are not even aware that employers are assessing them, much less how. This lack of transparency and disclosure to workers about how such systems evaluate them makes it

⁸ Equal Employment Opportunity Commission, *Systemic Enforcement at the EEOC* (2021), <https://www.eeoc.gov/systemic-enforcement-eeoc>.

⁹ Coalition Memo to EEOC and OFCCP on Addressing Technology’s Role in Hiring Discrimination (July 13, 2021), <https://www.aclu.org/letter/coalition-memo-addressing-technologys-role-hiring-discrimination>.

difficult for workers to detect when they have a viable discrimination claim, thereby obstructing workers' opportunity to seek legal recourse.

In addition to the findings from systemic investigation, the SEP points to other ways that the Commission will address this information gap. The Commission's educational and outreach activities will be particularly vital given the difficulty of modifying the 1978 Uniform Guidelines for Employee Selection Procedures (UGESPs) on which employers and vendors continue to greatly rely. The Commission's May 2022 guidance on algorithmic disability discrimination was a good start on providing more modernized educational resources to employers, vendors, and workers,¹⁰ and the Commission can build upon this guidance by addressing algorithmic bias affecting all protected classes. The SEP also states that, where the Commission lacks adequate resources to litigate a reasonable cause finding, the Commission can share information with parties that facilitates private litigation against a discriminatory technology-driven employment practice, which would help address the lack of transparency that makes it difficult for workers to successfully pursue private enforcement.

The SEP also states that the Commission will address practices and policies that limit access to advancement opportunities based on protected status. This is an important area of focus, since technological tools can contribute to discrimination not just at the time of hiring, but also in how workers are assessed and managed. The practices examined by the Commission should include the use of "bossware" in workplaces, which as these comments explain below, is among the areas on which we recommend the final SEP includes guidance.

Some issues are worth greater attention in the final SEP

We are encouraged by the Commission's expressed intent to focus on fighting technology-driven discrimination in the coming years. In this section, we note a few areas where we believe greater emphasis in the final SEP—and greater enforcement attention in the period it covers—is warranted.

New threats to fairness and validity in modern selection tools

The SEP should recognize the need for guidance and clarification regarding how existing law and regulations, including the UGESPs, apply to modern selection procedures. Where a selection

¹⁰ EEOC Guidance on ADA and Technology-Based Assessments, *supra* note 6.

procedure has a disparate impact, Title VII and the ADA both require an employer or employment agency to demonstrate that it “is job related *for the position in question* and consistent with business necessity.”¹¹ But increasingly, employers are using tools that (1) measure abstract or amorphous characteristics not tailored to the job in question; and/or (2) rely on machine-learning techniques that use correlation alone—rather than a logical or causal relationship with job functions—to establish a link between test results and job performance.

To address these risks, the Commission should caution employers about the risks of tools that have not been rigorously tested for validity under modern standards. It should clarify that a tool will not be considered job-related if it purports to measure abstract and subjective traits such as “empathy,” “influence,” or “personality,” or other characteristics untethered from the specific duties or essential functions of the jobs for which candidates are being evaluated. That is precisely the sort of measurement of “the person in the abstract,” rather than for a specific job, that the Supreme Court warned against in *Griggs v. Duke Power Company*¹² and that the text of Title VII and the ADA expressly prohibits.¹³

Additionally, the EEOC should issue clear guidance cautioning employers about deploying machine-learning algorithms that rely exclusively on correlation. Such tools do not examine whether the attributes that a model uses to predict job performance are logically or causally related to the essential functions of a job, nor do they analyze whether the attributes in the training data include a set of variables that are representative of the skills needed to perform a particular job.¹⁴ As a result, these correlation-dependent tools tend to evaluate candidates on unrepresentative or irrelevant traits.¹⁵

The Commissions’ May 2022 guidance on algorithm-driven discrimination against workers with disabilities is a great first step in pushing back against the use of these types of tests. The guidance advised employers to ensure that “tools only measure abilities or qualifications that are truly necessary for the job” and that “necessary abilities or qualifications are measured

¹¹ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Title VII) and 42 U.S.C. § 12112(b)(6) (ADA) (emphasis added).

¹² 401 U.S. 424, 436 (1971).

¹³ 42 U.S.C. § 2000e-2(k)(1)(A)(i); 42 U.S.C. § 12112(b)(6).

¹⁴ See also Matthew U. Scherer, et al., *Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms*, 71 So. Car. L. Rev. 449, 487 (2019), https://ssrn.com/abstract_id=3472805.

¹⁵ This issue is discussed in greater detail in the testimony that one of these comments’ co-authors presented to the Commission last month. See *Confronting the Threat of Employment Discrimination in the Algorithmic Age*, Testimony of Matthew Scherer, before the EEOC, Jan. 31, 2023, <https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new/scherer>.

directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.”¹⁶ There is a risk that stakeholders interpret that guidance as raising concerns *only* about hiring tools’ impact on disabled workers, rather than *all* workers who are subjected to unsound assessment techniques. The Commission’s final SEP should mark measurement of abstract characteristics and purely correlation-driven tools as examples of areas where additional guidance and education will aid enforcement in the coming years.

The discriminatory impact of bossware (automated surveillance and management systems)

The draft SEP mentions “production and performance management tools” and other “emerging technological tools used in employment decisions” as posing novel risks of discrimination based on protected characteristics. The rising use of such “bossware” tools is worthy of greater attention in the final SEP, and in the EEOC’s subsequent enforcement activities, due to the significant discrimination risks they pose and the absence of other regulatory tools that can be used to avert or mitigate those risks.¹⁷

Many companies use bossware systems to collect massive amounts of data on workers, including information related to protected characteristics. This increases the risk of discrimination against vulnerable and marginalized workers and poses a threat to workers’ health and safety, since companies often use such technologies to create and maintain a grueling pace of work. This monitoring and pacing significantly increases risk of physical injuries,¹⁸ particularly those stemming from repetitive motion, which can lead to long-term disability and exacerbate existing disabilities. Intrusive use of bossware also increases job strain, a form of compounded physiological and mental health pressure that occurs when workers face

¹⁶ EEOC Guidance on ADA and Technology-Based Assessments, *supra* note 6.

¹⁷ See Matthew Scherer, Center for Democracy & Technology, *Warning: Bossware May Be Hazardous to Your Health* (2021), <https://cdt.org/insights/report-warning-bossware-may-be-hazardous-to-your-health/>.

¹⁸ The Washington State Department of Labor’s citation against Amazon in 2021 stated that “[t]here is a direct connection between Amazon’s employee monitoring and discipline systems and workplace MSDs (musculoskeletal disorders).” Washington State Department of Labor and Industries, Citation and Notice: Amazon Services 2 (May 4, 2021), <https://s3.documentcloud.org/documents/20787752/amazon-dupont-citation-and-notice-may-2021.pdf>. The poultry processing injury has also had one of the highest injury rates in the economy since they used new surveillance methods to dramatically increase line speeds. Saima Akhtar, *Employers’ new tools to surveil and monitor workers are historically rooted*, Washington Post (May 6, 2021), <https://www.washingtonpost.com/outlook/2021/05/06/employers-new-tools-surveil-monitor-workers-are-historically-rooted/>; Human Rights Watch, *When We’re Dead and Buried, Our Bones Will Keep Hurting* (2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>.

intensive job demands but have little control over the manner in which they are permitted to do their work.¹⁹

All workers subjected to intrusive bossware monitoring may experience these threats to their health and safety, but the risks are particularly great for the millions of U.S. workers with disabilities, and thus are discriminatory in their effects. Employers frequently deploy the tools in a way that fails to account for disabled workers' right to reasonable accommodation or that allows for a meaningful interactive process. Using bossware to maintain rigid productivity standards and reduce or eliminate downtime and breaks (that many disabled workers need to attend to their bodies' and minds' needs) tends to screen out disabled workers.

The rising use of these technologies thus threatens to further erode disabled workers' rights and dignity. Additionally, bossware is more heavily used in low-wage and hourly jobs that are disproportionately held by Black, Latinx, immigrant, and women workers.²⁰ The aggressive enforcement of productivity requirements also has consequences for workers who are pregnant or breastfeeding, or who need religious prayer breaks.²¹ The increase in prominence of bossware should prompt a corresponding increase in scrutiny of their discriminatory potential.

Other topics in need of additional guidance

The final SEP should also signal the EEOC's intent to issue additional guidance and/or focus compliance and enforcement efforts on the following topics:

- Auditing requirements for AEDTs and other modern selection tools: This is closely tied to the above discussion on the unique discrimination and validity risks posed by modern selection tools. At present, many of the publicly released AEDT "audits" are not worthy of the name, often functioning more as vehicles to market vendors' products than a

¹⁹ See Human Rights Watch, *supra* note 18, at 3-4, 38-39. An influential 1979 paper by Robert Karasek first defined job strain as the combination of high "psychosocial workload demands" and low "decision latitude" and identified its relationship with anxiety, depression, insomnia, and other negative health outcomes. See Robert A. Karasek, Jr., Job Demands, Job Decision Latitude, and Mental Strain: Implications for Job Redesign, 24 Admin. Sci. Qtrly 285 (1979).

²⁰ Aiha Nguyen, Data & Society, *The Constant Boss: Work Under Digital Surveillance* 4 (2021), https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf.

²¹ *The Future of Work: Protecting Workers' Civil Rights in the Digital Age*, Before House Comm. on Ed. & Labor, Civil and Human Serv. Subcomm. (2020) (testimony of Jenny Yang), <https://www.congress.gov/116/meeting/house/110438/witnesses/HHRG-116-ED07-Wstate-YangJDJ-20200205.pdf>.

genuine effort to determine if the tools are discriminating against the full array of protected classes covered by anti-discrimination laws. The final SEP should indicate that the EEOC will explore issuing best-practice guidance on how employers can audit their tools to ensure their use will not result in violations of federal antidiscrimination laws. For this, we would direct the Commission's attention to the *Civil Rights Standards for 21st Century Employment Selection Procedures*, which we and a coalition of allied civil rights and workers' rights organizations released in December 2022.²²

- How the EEOC will interpret and apply Title VII, the Age Discrimination in Employment Act, and other anti-discrimination statutes when assessing AEDTs and other modern selection tools: this guidance would be an essential follow-up to last year's welcome guidance on ADA considerations for AEDTs.²³

Conclusion

The Strategic Enforcement Plan sends a strong and welcome message to all stakeholders in the civil rights and workers' rights communities that the EEOC is monitoring the risks associated with new technologies that affect employment opportunities and is poised to take appropriate action to protect the rights of workers, particularly those from vulnerable and marginalized groups. We thank the Commission for the opportunity to comment on the SEP and look forward to engaging with the EEOC in the coming years as it confronts the novel discrimination risks posed by modern employment decision tools.

Respectfully submitted,

Matthew Scherer
Sr. Policy Counsel, Privacy & Data Project
mscherer@cdt.org

Ridhi Shetty
Policy Counsel, Privacy & Data Project
rshetty@cdt.org

²² Center for Democracy & Technology, et al., *Civil Rights Standards for 21st Century Employment Selection Procedures* (2022), <https://cdt.org/insights/civil-rights-standards-for-21st-century-employment-selection-procedures/>.

²³ EEOC Guidance on ADA and Technology-Based Assessments, *supra* note 6.